

**NITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28**

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UNITED STATES POSTAL SERVICE)	Case 28-CA-222265
)	28-CA-224055
and)	28-CA-227057
)	28-CA-227485
AMERICAN POSTAL WORKERS UNION)	28-CA-227490
LOCAL 380, AFL-CIO)	28-CA-227628
)	28-CA-229633
)	28-CA-229647
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RESPONDENT'S POST HEARING BRIEF

Respondent, United States Postal Service ("Postal Service" or "Service"), pursuant to Section 102.42 of the Board's Rules and Regulations, as amended, hereby submits its post-hearing brief. According to the order of Administrative Law Judge Jeffrey Wedekind, post-hearing briefs must be submitted on or before October 21, 2019.

For the reasons set forth in more detail below, Respondent requests that the allegations set forth in this case be dismissed. Specifically, the evidence and testimony presented demonstrate no violation of Sections 8(a)(1), (3), (4) or (5) of the Act.

A. FACTUAL BACKGROUND & INTRODUCTION

The consolidated complaint (GC Exhibit 1(a)), filed on January 30, 2019, involves eight charges. One charge [28-CA-222265] alleges violations of Sections 8(a)(1), (3) and (4) of the Act when "Respondent denied a request from its employee Daniel Diaz-Huerta for five weeks of leave without pay." GC Exhibit 1(a), ¶¶ 5(a), 8 and 9. Four of the charges [28-CA-227057, 28-CA-227485, 28-CA-227490 and 28-CA-227628] allege violations of Sections 8(a)(1), (3), (4) and (5) of the Act when "Respondent shut off or

failed to maintain the facsimile machines” at multiple Albuquerque, NM, facilities. Id., ¶¶ 5(b)-(f), 8, 9 and 10. Finally, three of the charges [28-CA-224055, 28-CA-229633 and 28-CA-229647] allege violations of Sections 8(a)(1) and (5) of the Act when Respondent either refused and failed to provide, or unreasonably delayed in providing, requested information. Id., ¶¶ 7 and 10. Respondent denies all the allegations and asserts that the evidence and testimony show that there were no violations of the Act.

1. The Alleged Retaliation

The story that emerges from the testimony and exhibits is not that of a victim of alleged discrimination and retaliation. Rather, the evidence shows an unflattering portrayal of an unmotivated employee with an arrogant belief that he (Mr. Huerta) is not accountable to Postal Service rules and policies and that he has no obligation to even minimally perform his duties or bargain in good faith with Postal Service management. This was graphically demonstrated in the General Counsel's opening statement.

“Mr. Diaz-Huerta was sitting in Mr. Yazzie's office, blustering about all the National Labor Relations Board charges that he had filed in the previous year and resisting Mr. Yazzie's proposed solution to all of the problems related to how Respondent processes requests for information from the Union.”¹ The General Counsel also alleged in her opening that “Mr. Diaz-Huerta was spending roughly zero hours per week working in his bid job and was instead receiving almost 100 percent union time”² during the events in question.

Testimony will show that Mr. Diaz-Huerta was actually expected to do window relief at his station, a duty he consistently ignored, despite the minimal burden on his

¹ Tr. pp 13-14

² Tr. p 14

time. He was also expected to load incoming mail into customers' PO boxes in the morning, which he did intermittently, but more so in the month of September 2018. Subsequent testimony will also show that there can be dire operational consequences when a clerk such as Mr. Diaz-Huerta failed to report for duty, or when staffing levels are not at an appropriate level for a facility.

Consequently, Respondent had legitimate business reasons for denying Mr. Huerta his requested leave. His intransigence in accepting anything less than his demanded leave and his significant delay in requesting his leave both undercut his credibility in this matter.

2. The Fax Machine issue

The allegations that Respondent was shutting off or failing to maintain fax machines are absurd on their face, and these allegations are totally discounted by the testimony and evidence presented. Evidence and testimony will also show that the Union had multiple methods by which to submit requests for information, which they chose to ignore.

3. The Requests for Information

The evidence and testimony will show that the union's claims are duplicitous and without merit, and that the information was provided in a timely manner.

B. STATEMENT OF FACTS

1. The Leave Without Pay Issue - 28-CA-222265

As stated *infra*, the General Counsel alleges that the Postal Service denied Mr. Diaz-Huerta's request for Leave without Pay ("LWOP"), allegedly in retaliation for his union activities. However, the testimony and evidence show a different story.

Mr. Huerta requested leave because of an offer by the Spanish government to grant dual citizenship to “descendants of Spanish Jewry.”³ Although he first requested leave without pay in writing in May 2018⁴, Mr. Huerta knew about and began the process of applying for dual citizenship in 2016.⁵ However, it appears that the window to apply for dual citizenship was due to expire in October 2018.

When asked why he waited almost two years to request leave from the Postal Service, Mr. Huerta testified that he did not apply for this two year period because he was grieving his mother’s passing in November 2016.⁶ While sympathetic to Mr. Huerta’s loss, it strains credulity to assign any legitimacy to Mr. Huerta’s alleged desire to obtain dual citizenship since he waited two years to even request leave. This is borne out by the fact that Mr. Huerta refused to request annual leave for this supposedly important trip, when he had two or three weeks of annual leave.⁷ Even though this trip was allegedly important to him, it was not important enough for him to use any annual leave. In fact, it appears that as far as Mr. Huerta was concerned, it was all or nothing regarding his demand for leave without pay.

Aside from Mr. Huerta’s questionable timing and intent in requesting leave without pay, the record also shows that the Postal Service had a legitimate business reason for denying Mr. Huerta’s request. In denying Mr. Huerta’s request, Postmaster Yazzie wrote that it was disapproved because of the “needs of the Service.”⁸

³ GC Exh. 6 – see also Tr. pp. 396-397

⁴ Tr. pp. 389-391; GC Exh. 4 & 5

⁵ Tr. p. 488; R Exh. 4

⁶ Tr. p. 488

⁷ Tr. p. 488

⁸ GC Exh. 7 & 12; Tr. p. 62

Further testimony clarified how “needs of the Service” applied to Mr. Huerta’s leave request. First, while Mr. Huerta spent most of his time on union business, he was required to show up for his paid job to provide lunch relief to the other two clerks at the North Valley Carrier Annex (“NVCA”), Mr. Huerta’s assigned duty station.⁹ Furthermore, he was originally scheduled to arrive early and place mail in customers’ PO Boxes¹⁰, but that also created scheduling problems because he took four hours to do a 45 minute job.¹¹ Because he was so slow and his attendance was so irregular, management at NVCA for a time took Mr. Huerta off the morning schedule.¹² According to his manager’s testimony, he was “supposed to cover lunches from 12 to 2 Monday through Thursday.”¹³ However, by September 2018 Mr. Huerta was back at the station spending more time doing his actual job as a window clerk.¹⁴

Even so, Mr. Huerta regularly disregarded his obligation to request leave in advance¹⁵, which created operational problems. Supervisor Mann testified that even when scheduled to do lunch relief, Mr. Huerta still didn’t show up, which created a burden for the other window clerks.¹⁶ Mr. Huerta was evasive and less than forthright when questioned about his penchant for not observing his obligation under the contract to call off and take time off without notice.¹⁷ However, despite his apparently overwhelming need for union time during the period in question (2018), Mr. Huerta filed

⁹ Tr. p. 288 (Keeran direct by GC)

¹⁰ Tr. pp. 181-182; p. 200; GC Exh. 16 (clerk schedule) showing 7:15 reporting times for Mr. Huerta

¹¹ Tr. p. 179 (Mann direct by GC)

¹² Tr. p. 200; GC Exh. 16

¹³ Tr. p. 290 (Keeran direct by GC)

¹⁴ Tr. p. 205; GC Exh. 16

¹⁵ Tr. p. 290

¹⁶ Tr. p. 204

¹⁷ Tr. pp. 495-497; see also Article 17.3 of the CBA - Joint Exhibit 1

no grievances with his station manager Melissa Keeran¹⁸ and only met on one grievance with Postmaster Yazzie.¹⁹

In summary, Mr. Huerta was regularly scheduled to box mail in the morning and/or provide lunch break relief to his fellow window clerks. His failure to keep these scheduled commitments caused hardships for the operation and other employees. Granting him five weeks LWOP would only have magnified these operational problems.

With regard to scheduled vacation time and leaves without pay, a similar hardship could have existed that would have implicated the needs of the Service. To be clear, the decision to grant or deny LWOP is discretionary. The Employee Labor Relations Manual (“ELM”)²⁰ sets forth the guidelines under which LWOP requests are evaluated. Ed Arvizo testified that “Leave without pay is a matter of administrative discretion, except in certain circumstances regarding a disabled veteran or reservist, FMLA issues.”²¹ “Each request for LWOP is examined closely, and a decision is made on the needs of the employee, the needs of the Postal Service and the cost to the Postal Service.”²²

As explained in more detail below, granting Mr. Huerta his LWOP in September 2018 could have resulted in understaffing at his assigned unit, the NVCA, which directly implicates the needs of the Service. This is because requests for annual leave (essentially vacation time) are recorded on an annual leave roster²³ and take priority over LWOP requests.

¹⁸ Tr. p. 314 (Keeran cross by Respondent)

¹⁹ Tr. pp. 91-92 (Yazzie cross by Respondent)

²⁰ Joint Exh. 5 (the ELM); GC Exh. 12 (Yazzie letter denying Huerta’s LWOP request)

²¹ Tr. p. 509 (Arvizo direct by GC); (see also GC Exh. 12)

²² Joint Exh. 5 (the ELM), Section 514.22; GC Exh. 12

²³ Tr. p. 60; p. 520; GC Exh. 8

Albuquerque has a local memorandum of understanding (“LMOU”)²⁴ that governs requests for annual leave and staffing levels. The LMOU also provides that no more than 15% of the applicable unit may be on annual leave at any given time.²⁵ There are three window clerks at the North Valley Carrier Annex, so only one clerk may be off on annual leave at a time.²⁶

Under the provisions of the LMOU, annual leave requests should be submitted at the beginning of the year.²⁷ However, the leave roster is an “evergreen” document that can be supplemented later in the year if an employee subsequently requests annual leave.²⁸ So in the instant matter, even if the September leave roster was empty, if Mr. Huerta had been granted his LWOP and someone subsequently requested annual leave in September, that annual leave would have to be granted and the NVCA would have been understaffed in violation of the LMOU.²⁹

Mr. Arvizo, who drafted GC Exh. 12 for Postmaster Yazzie³⁰ on Mr. Huerta’s LWOP request, testified directly on this matter.

If we gave a leave without pay to an employee, that week is still available [for annual leave]. Someone could bid that annual leave and then you’re taking two out of the three employees away from that unit, one on leave without pay, one on annual leave.³¹

²⁴ Joint Exh. 2

²⁵ Tr. p. 523; Joint Exh. 2, p. 16.

²⁶ Tr. p. 523; Joint Exh. 2, p. 16.

²⁷ Joint Exh. 2 – pp.7-8

²⁸ Tr. p. 520-521 (Arvizo direct by Respondent)

²⁹ Tr. p. 529-530

³⁰ Tr. p. 509

³¹ Tr. pp. 524-525

Postmaster Yazzie also testified to this effect, that he would have had to grant annual leave to someone if they were eligible regardless of whether someone was already on LWOP.³²

Postmaster Yazzie determined that he had the discretion under the ELM to approve or deny Mr. Huerta's LWOP request. And he testified that he believed that Mr. Huerta would be spending more time in his bid job and less on grievances.³³ Mr. Yazzie's judgment has since been vindicated as Mr. Huerta was doing more of his actual job in September, and he only filed one grievance in 2018.³⁴

Furthermore, the potential impact of Mr. Huerta's desired absence was real. Under direct questioning by the GC, Mr. Arvizo testified that

But yes, there have been times when the facilities have not opened on time because of the lack of staffing from employees calling in, based -- and in conjunction with preapproved leave.³⁵

Postmaster Yazzie also testified that

So when we have someone on long-term LWOP, that impacts our bottom line, it impacts service to our customers, it impacts overtime percentages, possibly at a penalty rate, which is double the overtime rate. Then also, you know, it puts us at risk of possibly not opening a unit by a couple hours when we're faced with those challenges.³⁶

Finally, Mr. Yazzie credibly denied any retaliatory motive for refusing Mr. Huerta's LWOP request.³⁷

Despite the General Counsel's attempts to elicit testimony that Mr. Huerta's five-week LWOP would have been inconsequential to the Postal Service's operations, the

³² Tr. pp. 620-621

³³ Tr. p. 81

³⁴ See fn. 18 & 19, *supra*

³⁵ Tr. p. 528 Ed Arvizo direct by GC

³⁶ Tr. p. 617

³⁷ Tr. pp. 92-93

evidence shows that the “needs of the Service” was a valid reason for refusing his LWOP request. This refusal was based on legitimate business needs and it was most definitely not retaliatory.

2. The Fax Issue

As stated *supra*, the General Counsel has alleged in four of the charges [28-CA-227057, 28-CA-227485, 28-CA-227490 and 28-CA-227628] that the Respondent violated Sections 8(a)(1), (3), (4) and (5) of the Act when “Respondent shut off or failed to maintain the facsimile machines” at multiple Albuquerque, NM, facilities. *Id.*, ¶¶ 5(b)-(f), 8, 9 and 10. The evidence and testimony do not support these allegations.

The Consolidated Complaint alleged, in ¶¶ 5(b)-(f), that on the dates and locations listed,

- (b) About September 9, 2018, Respondent shut off or failed to maintain the facsimile machines located at Academy, Highland, University, Kirtland Air Force Base, Rio Rancho, Richard Pino, Alameda, and Cottonwood facilities.
- (c) About September 12, 2018, Respondent shut off or failed to maintain the facsimile machines located at Steve Schiff facility.
- (d) About September 15, 2018, Respondent shut off or failed to maintain the facsimile machines located at Steve Schiff facility.
- (e) About September 15, 2018, Respondent shut off or failed to maintain the facsimile machines located at North Valley Carrier Annex.
- (f) About September 15, 2018, Respondent shut off or failed to maintain the facsimile machines located at Five Points Station.

Pursuant to the GC’s subpoena, Respondent produced fax activity reports for the locations and dates at issue.³⁸ Perry Dotson, the Arizona District information systems specialist, testified about these fax reports. Mr. Dotson, as an IT expert who deals with

³⁸ GC-31, GC-32, GC-33, GC-38, GC-39, GC-40, and GC-41.

faxes, testified that the fax machines were all on and operating at the dates and times designated in the Consolidated Complaint.³⁹

- Exhibit 31, the Five Points fax activity log, shows fax activity on September 15, the date the GC alleges the machine was shut off. (the log also showed activity on the 11th, 12th, 13th and 14th)⁴⁰
- Exhibit 32, the Steve Schiff fax activity log, shows fax activity on September 12 and September 15, dates the GC alleges the machine was shut off. (and activity on the 10th, the 13th, 14th and the 17th)⁴¹
- Exhibit 33, the North Valley fax activity log, shows fax activity on September 15, the date the GC alleges the machine was shut off. (also the 10th, 11th, 12th, 13th and 14th, 17th and 18th)⁴²
- Exhibit 38, the Academy fax activity log, shows fax activity on September 9, the date the GC alleges the machine was shut off. (and activity on the 8th and the 10th through the 15th)⁴³ [*for the record, September 9, 2018, was a Sunday*]⁴⁴
- Exhibit 39, the Highland fax activity log, does not show fax activity on September 9, the date the GC alleges the machine was shut off. (but it does show activity on the 10th, 11th, 13th & 15th)⁴⁵
- Exhibit 40, the Rio Rancho fax activity log, does not show fax activity on September 9 [*a Sunday*], the date the GC alleges the machine was shut off. (but it does show activity on September 14th & 15th)⁴⁶
- Exhibit 41, the Richard Pino fax activity log, does not show fax activity on September 9 [*a Sunday*], the date the GC alleges the machine was shut off. (but it does show activity on September 7th, 8th, 12th & 13th)⁴⁷

Moreover, all the managers who testified stated that the fax machines were multifunctional (i.e., printer copier and fax), nothing would work if the machine were to

³⁹ Tr. p. 594

⁴⁰ Tr. p. 594

⁴¹ Tr. p. 593

⁴² Tr. pp. 592-593

⁴³ Tr. pp. 589-591

⁴⁴ Tr. p. 587

⁴⁵ Tr. pp. 591-592

⁴⁶ Tr. pp. 588-589

⁴⁷ Tr. pp. 586-588

be shut off, and they were essential to running the business.⁴⁸ So shutting these machines down would have affected the managers' ability to do their work. They also all testified that they neither received instructions to turn off the fax machines nor did they turn off the fax machines themselves.⁴⁹

Essentially the union's fax issue is fabricated. On July 3, 2018, Postmaster Yazzie sent a letter to Mr. Huerta in which he announced that each Albuquerque station would have a dedicated fax number for processing of the union's information requests.⁵⁰ Furthermore, Postmaster Yazzie asserted in his July 3rd letter that "the local APWU has no jurisdiction over the fax machines at the Albuquerque Post Office or City Stations." Postmaster Yazzie testified that "basically is a number where we -- it can be used as a fax machine, and it goes directly into an email account, which would typically go to the station manager then off to our DMO."⁵¹

Postmaster Yazzie followed up with a letter dated September 21, 2018, to union president Ken Fajardo in which he reiterated the station fax number issue and pointed out that Mr. Huerta had been untruthful in asserting that he had not seen the July 3rd letter.⁵²

When questioned about this July 3rd letter, Mr. Huerta testified that he refused to use the provided fax numbers "because [the fax machines] is what we've always used."⁵³

Q. Yeah. It's a simple yes or no. You've let management know in June that there were problems with the fax machines. You were given an alternative mean of

⁴⁸ Tr. p. 143 – Andy Letterhos direct by GC; Tr. p. 197 - Gurdeep Mann direct by GC; Tr. p. 239 – Sam Pantoja direct by GC;

⁴⁹ Tr. p. 92 (Yazzie); Tr. pp. 197-198 (Mann); Tr. p. 240 (Pantoja)

⁵⁰ Respondent Exh. 3. The court found this letter to be relevant as well. (Tr. p. 482)

⁵¹ Tr. pp. 43-44

⁵² GC. Exh. 71

⁵³ Tr. p. 481

submitting faxes in July. Why didn't you use that if you were having problems with fax machines?

A. Because this is what we've always used. This is the fax machine that's all --

Q. So the way we've always done it is your reason for not trying to get communications effectively to management?

A. No. In the past, I've sent second requests.

Q. But you didn't use the alternative means given to you?

A. No, not these numbers.

Moreover, the union has multiple channels by which they can submit information requests other than by fax. On February 1, 2019, North Valley Station Manager Melissa Keeran emailed various union officials that the fax machine at her station was inoperable.⁵⁴

In that email Ms. Keeran wrote:

In the meantime, you may continue to send information requests to the designated fax # to receive information requests for North Valley at 650-578-4642, or you may email them directly, or you can mail them, or you can submit them in person.

In her direct examination of Ms. Keeran, Counsel for the General Counsel tried to equate a fax machine failure to a violation of the 10th Circuit Court orders.⁵⁵ However, Ms. Keeran undermined that erroneous assumption in her unrebutted testimony.

Q. Ms. Keeran, are you aware that the Albuquerque postal installation is subject to a number of 10th Circuit court orders relating to requests for information and the acceptance and processing of those requests for information?

A. Yes.

Q. And are you aware that the Union frequently submits requests for information by fax?

A. Well, I know they probably do to other stations, but most of the requests for information that we receive at North Valley come through the email. And then Sam Wood will hand-deliver if he's meeting on a grievance he has them. I've had plenty of them either drop them off in person or send them via email.

⁵⁴ Tr. p. 305, GC Exh. 43

⁵⁵ Joint Exh. 7 & 8

Q. But you are aware that there are some stewards who prefer to use fax?

A. No. I mean, I don't know every steward's preference of how they request information. I just know that most of my communications in dealing with information requests come from being hand-delivered or come through the email.

Q. Okay. Are you familiar with -- have you received any requests for information from Mr. Huerta?

A. Yes, via email.⁵⁶

Simply put, the union would rather file charges than work with management to either fix these problems or use the multiple means available to the union to communicate with management.⁵⁷ Respondent respectfully urges the court not to countenance the union's false claims in this matter.

Finally, the General Counsel tried, and failed, to assert that the multiple stakeholders' reports⁵⁸ created an incentive for Postal Service management to retaliate against the union. However, Postmaster Yazzie credibly testified that these reports were not bothersome to him.⁵⁹

Q. So were you upset about all of these stakeholder reports and the publicity and --

A. No. No, not at all. You know, it's -- you know, we've had -- you know, the post office is always in the news.

So, you know, my job is to solve the problems, my job is to continue to move the mail, keep my employees safe and build the trust in the community and, you know, provide the services that we're paid to do. So as far as getting mad, no.

⁵⁶ Tr. pp. 305-306

⁵⁷ Tr. p. 481

⁵⁸ GC Exh. 22(a)-(d)

⁵⁹ Tr. p. 631; pp. 644-645

3. Charge # 28-CA-244055

In ¶ 7(a) of the Complaint the GC alleged that Respondent failed to provide the following information to the union that had been requested on July 5, 2018:

- 1) Daily Run Program Generator (RPG) reports to Tour 1 Automation (Pay Loc 171) for leave years 2017, 2018; and
- 2) Daily RPG reports for Tour 3 Automation (Pay Loc 371) for leave years 2017, 2018.

However, the testimony and evidence present a different story. Plant Manager Mark Jones, the recipient of the information request at issue, testified that he had already given the information to union president Ken Fajardo on May 25, 2018.⁶⁰ Mr. Jones also testified that he gave the same information again to Mr. Fajardo at a meeting on June 27, 2018.⁶¹ The requested information was actually part of the meeting minutes from that meeting.⁶²

Mr. Jones also testified about the DMO (“designated management official”)⁶³ procedure he put in place for the plant.⁶⁴ Mr. Jones provided Mr. Fajardo with a memo setting out that procedure on November 13, 2017.⁶⁵ However, Mr. Fajardo did not use the DMO process when he submitted the RFI at issue.⁶⁶ Mr. Jones testified that Mr. Fajardo was initially receptive to the DMO process but subsequently announced that he would not follow it.⁶⁷

⁶⁰ Tr. p. 108

⁶¹ Tr. p. 126

⁶² Tr. p. 108; Respondent Exh. 1

⁶³ Tr. p. 109

⁶⁴ Tr. pp. 118-119

⁶⁵ Respondent Exh. 2

⁶⁶ Tr. p. 119

⁶⁷ Tr. p. 110

On cross, Mr. Fajardo testified that he “normally” got responses from his emails.⁶⁸ And he testified that he didn’t do anything to draw Mr. Jones’ attention to the fact that there was a pending RFI – no email, no phone call, no meeting, no nothing.⁶⁹ Nor did Mr. Jones bother to contact the DMO for the Plant, Casey Christophersen.⁷⁰ Mr. Fajardo conceded that follow up was important, but he admitted that he failed to do so.⁷¹

Mr. Fajardo testified that when he sent the RFI via email on July 5, 2018, that the deadline was actually the following day.⁷² But as of July 30, 25 days later, Mr. Fajardo had not followed up.⁷³

Basically, Mr. Fajardo had already received the information by the time he filed his RFI. And although he deemed the matter important, it was not important enough for him to follow up with management. Instead he filed a charge for information he already had. This is the essence of bad faith bargaining by the union and Respondent respectfully suggests that the court should not reward this behavior.

4. Charge # 28-CA-229633

In ¶ 7(c) of the Complaint, the GC alleged that Respondent failed to provide the following information to the union that had been requested on September 28, 2018:

- (2) Other job offers made to Janelle within craft
- (3) Description of job duties for Janelle [Gonzales]
- (4) Notification to APWU of light limited duty for Janelle

⁶⁸ Tr. p.576

⁶⁹ Tr. p. 576

⁷⁰ Tr. p. 577

⁷¹ Tr. p. 578

⁷² Tr. p. 578

⁷³ Tr. pp. 575-576

The union gave Mr. Mann an RFI dated 9/28/18 asking for several items with regard to a carrier allegedly doing work outside her craft.⁷⁴ Steward Wood testified that he received items 1 and 5 and 6 of that RFI within 5 days.⁷⁵ In GC Exh. 19, Mr. Mann denied the related grievance on 10/12/18.⁷⁶

Not to be deterred, the union filed a second RFI on 10/31/18 asking for the same information.⁷⁷ Mr. Mann testified with regard to GC Exh. 20 that he did not believe he had an obligation to respond to # 4 because Ms. Gonzales was not crossing crafts.⁷⁸ Respondent avers that GC 46 was responsive to items 2, 3 & 4 of the RFI's, because it showed an offer of modified work assignment that was provided to the union on October 31, 2018.⁷⁹

5. Charge # 28-CA-229647

Paragraph 7(d) of the Complaint alleges that “on about October 1, 2018, the Union, in writing requested that Respondent furnish the Union with PS 3971 for all clerks FTR and PSE at the Five Points station for 09/15/2018 - 09/28/2018.”

Steward Susan Naranjo testified that she emailed these RFI's⁸⁰ to manager Sam Pantoja on October 1, 2018.⁸¹ *[Please note that Ms. Naranjo emailed these RFI's – she did not fax them.]*⁸²

⁷⁴ Tr. p. 191; GC Exh. 18

⁷⁵ Tr. pp. 326-327

⁷⁶ Tr. p. 326

⁷⁷ Tr. p. 194, GC Exh. 20

⁷⁸ Tr. p. 194

⁷⁹ Tr. p. 365; GC Exh. 46

⁸⁰ GC Exhibits 23 & 24

⁸¹ Tr. p. 334

⁸² Tr. pp. 344-346; GC Exh. 25

In this instance, Manager Pantoja did not fail or refuse to provide the subject information to Steward Naranjo. Mr. Pantoja testified that he met with Ms. Naranjo on October 4 and hand delivered all three RFIs at issue in this instant matter on October 4, 2018.⁸³ Mr. Pantoja also testified that Ms. Naranjo reviewed the documents he had provided her and she stated that she had everything.⁸⁴

On the other hand, Ms. Naranjo was evasive and less than credible when asked on direct by the GC whether she had met with Mr. Pantoja on October 4th to receive the documents. Her answer was “I don't remember.”⁸⁵ So it's more likely than not that the meeting did occur, that Ms. Naranjo received and reviewed the requested documents and that she expressed her satisfaction with them.

Subsequently Ms. Naranjo found that information for two clerks was missing from the documents hand delivered to her by Mr. Pantoja. Mr. Pantoja emailed the missing information to Ms. Naranjo on October 30, 2018.⁸⁶ Mr. Pantoja also testified that he had agreed to an extension for any related grievances, and so far as he was concerned there was no harm in terms of the Union being able to process the grievance as a result of this delay in the information requests.⁸⁷ In fact the grievance was settled on November 7, 2018.⁸⁸

Although there was some delay in providing a full response, nonetheless the steward initially led Mr. Pantoja to believe that his response on October 4th was satisfactory. Mr. Pantoja had granted an extension of any grievances to allow the union

⁸³ Tr. pp. 226, 237; GC Exh. 26

⁸⁴ Tr. p. 230; 237-238

⁸⁵ Tr. p. 347

⁸⁶ Tr. p. 354; GC Exh. 30

⁸⁷ Tr. p. 237

⁸⁸ Tr. p. 365; GC Exh. 45

time to receive and review all relevant materials, which he delivered on October 30th.

The matter was successfully settled so the Postal Service contends there was no harm to the union and the delay in fully responding is inconsequential.

6. Charge # 28-CA-227490

Paragraph 7(b) of the Complaint alleges that on about September 15, 2018, the Union, in writing, requested that Respondent furnish the Union with the copy of the Five Points Station “Box Section Audit” of July 2018 no later than the close of business day of September 19, 2018. Mr. Huerta acknowledged that his attempts to fax the RFI’s for box section audits failed⁸⁹, and that he also failed to follow up with a letter or email to station managers at each of the stations where he was not able to fax the request for information.⁹⁰

C. ARGUMENT

The General Counsel has not established by a preponderance of the evidence that the Postal Service has violated §§ 8(a)(1), 8(a)(3) or 8 (a)(4) of the Act either with regard to Mr. Huerta’s LWOP request or the fax machines. The General Counsel has also not established by a preponderance of the evidence that the Postal Service has violated § 8(a)(5) of the Act.

1) Respondent did not Violate § 8(a)(1) of the Act.

Section 8(a)(1) provides that it shall be an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.” 29 U.S.C. § 158(a)(1). A violation of Section 8(a)(1) “is

⁸⁹ Tr. p. 452

⁹⁰ Tr. p. 475

established by showing: (1) that employees are engaged in protected activities ...; (2) that the employer's conduct tends to interfere with, restrain, or coerce employees in those activities ...; and (3) that the employer's conduct is not justified by a legitimate and substantial business reason." Retlaw Broadcasting Co. v. NLRB, 53 F.3d 1002, 1006 (9th Cir. 1995); Fun Striders, Inc. v. NLRB, 686 F.2d 659, 661-62 (9th Cir. 1981). "As with all alleged violations of Section 8(a)(1), the General Counsel bears the burden of proof." Interbake Foods, LLC and BCTGM LOCAL 68, 2013 WL 4715677 (N.L.R.B. Aug 30, 2013), which must be established by a preponderance of the evidence. Galion Pointe LLC, 359 NLRB 699, (March 28, 2013). Once the employer establishes a legitimate business reason, the NLRB has the burden to establish that the primary motive for the adverse action was to punish the employee for protected activity." Id.

The elements necessary to establish an 8(a)(1) claim do not exist in this matter. The evidence shows that the Postal Service had legitimate and substantial business reasons for denying LWOP to Mr. Huerta. Nor has the General Counsel established by a preponderance of the evidence that the Postal Service's motive for the alleged adverse action was to punish the employee for protected activity.

Simply put, allowing Mr. Huerta to take a five-week LWOP in September 2018 could have resulted in a violation of the LMOU by reducing the staffing at his station below an acceptable level. At 15%, only one clerk out of three could have been absent at the same time. If his leave had been granted and another employee had requested annual leave at the same time, management would have been required to grant that leave and then two out of three clerks would have been absent. The evidence shows that Mr. Huerta was required to perform duties at his station and his absence could

have impaired the operation. Therefore a legitimate and substantial business reason existed for denying his leave request.

Moreover, aside from the factual absurdity of the allegation that management either failed to maintain or shut off the fax machines, the evidence shows that the union had multiple means by which to communicate with management, some of which the union pointedly chose to ignore. And there is no evidence that management shut down any fax machines or failed to maintain them. Testimony showed that the fax machines were operational at the times the union alleged they were not.⁹¹ There is consequently no basis for the union's claims in this regard.

2) Respondent did not Retaliate or Otherwise Violate § 8(a)(3) or § 8(a)(4) of the Act.

Section 8(a)(3) provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). "Section 8(a)(3) prohibits an employer from retaliating against an employee for engaging in union or other protected activities." N.L.R.B. v. Delta Gas., A Subsidiary of Louisiana Energy & Dev. Corp., 840 F.2d 309, 311 (5th Cir. 1988).

Section 8(a)(4) prohibits discriminatory treatment on the grounds of the filing of charges or the giving of testimony under the Act. McCullough Environmental Services, 306 NLRB 345, 369 (1992), enf'd NLRB v. McCollough Environmental Services, Inc. 5 F.3rd 923 (5th Cir. 1993).

⁹¹ Other than the North Valley fax, about which Melissa Keeran gave the union notice on February 1, 2019 – and she testified that the union didn't fax her RFI's anyhow

In order to determine whether an employee's discharge, or other adverse action against them violated the Act, the Board utilizes the analysis articulated in Wright Line, A Division of Wright Line, Inc., 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in NLRB v. Transportation Management Corp., 462 U.S. 393, 399-403 (1983). "The General Counsel bears the ultimate burden of proving every element of a claimed violation of the Act." Des Moines Register & Tribune, 339 NLRB 1035, 1037 n. 5 (2003). In the instant matter the General Counsel has not met his burden because he has not established a prima facie case.

Under Wright Line, the General Counsel establishes a prima facie case of discrimination under either § 8(a)(3) or § 8(a)(4) by showing that (1) the employee engaged in protected activity, (2) the employer had knowledge of that activity, and (3) union animus was a motivating factor. Wright Line, 251 NLRB at 1089. The General Counsel must establish by a preponderance of the credible evidence that the perceived anti-union sentiment was a "motivating factor" for the adverse action taken. Wright Line, *supra*.

Respondent concedes that the first two elements of the Wright Line analysis exist in this matter. However, the General Counsel has failed to show that any union animus existed with regard to the Postal Service's actions towards Mr. Huerta or the union. Just because Mr. Huerta or the union engaged in multiple protected activities does not on its own establish animus. The General Counsel has not established by a preponderance of the credible evidence that the perceived anti-union sentiment was a "motivating factor" for the adverse action taken. In fact, there is no evidence of anti-

union sentiment at all. Postmaster Yazzie testified credibly that the stakeholder reports cited by the General Counsel did not bother him. There was no testimony by anyone to rebut Postmaster Yazzie's assertion that he did not have any animus.

Subsequent to the end of the hearing in February, the record remained open until the Postal Service could produce, and the General Counsel could review, over 144,000 emails in response to the General Counsel's subpoena. After five months of review, the General Counsel and the Postal Service filed a joint motion on 9/12/2019, which added 48 pages to the record – GC Exhibits 81 through 100.

Frankly, after all that effort, the results are hardly worthwhile. Admittedly, in GC Exhibit 83, Postmaster Yazzie agreed with an opinion that the union were “dingbats.” But that is in the context of the union's generally unsupported claims of significant problems with the Postal Service's infrastructure in Albuquerque. GC Exh. 98 is a 9/7/18 email discussion with Postmaster Yazzie. Despite the apparent provocation of unauthorized, attempted visits to various Postal Service facilities with union representatives, Congressional representatives and/or their staffers. Postmaster Yazzie's discussion was business like and non-opinionated. This is not even remotely evidence of animus or anger from the union's attempts to create a *cause célèbre* over the union's stakeholder reports.

3. The Fax Machines are not a Subject of Mandatory Bargaining

The Postal Service has maintained the position that the fax machines are not a subject of mandatory bargaining over which the union has any jurisdiction. (See *Respondent's Exh. 3*). The Board and reviewing courts have long recognized that employees have “no statutory right ... to use an employer's equipment or media.” *Mid-*

Mountain Foods, Inc., 332 N.L.R.B. 229, 230 (2000), *order enforced*, *Mid-Mountain Foods, Inc. v. NLRB*, 269 F.3d 1075 (D.C. Cir. 2001). Employers “unquestionably [hold] the right to regulate and restrict employee use of company property,” *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663 (6th Cir. 1983). This includes the right to bar nonbusiness use of employer-owned communications equipment, such as telephones, bulletin boards, TV/VCRs, photocopiers – and email. See, e.g., *Adtranz, ABB Daimler-Benz*, 331 NLRB 291, 293 (2000), *vacated in part*, *Adtranz ABB Daimler Benz v. NLRB*, 253 F.3d 19 (D.C. Cir. 2001); (rule on email usage analogous to rules regarding use of bulletin boards and company telephones); *Cf. Media Gen. Operations, Inc.*, 346 N.L.R.B. 74, 76 (2005) *aff'd*, 225 F. App'x 144, 148 (4th Cir. 2007); *Union Carbide Corp.*, 714 F.2d at 663 (telephones); *NLRB v. Southwire Co.*, 801 F.2d 1252, 1256 (11th Cir. 1986); (bulletin boards); *Fleming Cos. v. NLRB*, 349 F.3d 968, 974–75 (7th Cir. 2003) (bulletin boards); *Mid-Mountain Foods*, 332 N.L.R.B. at 230 (*no statutory right to use the television in the respondent's breakroom to show a prounion campaign video*); see also *Eaton Technologies*, 322 NLRB 848, 853 (1997) (“*It is well established that there is no statutory right of employees or a union to use an employer's bulletin board.*”); *Champion Int'l Corp.*, 303 NLRB 102, 109 (1991) (stating that an employer has “a basic right to regulate and restrict employee use of company property,” such as a copy machine); *Churchill's Supermarkets*, 285 NLRB 138, 155 (1987) (“*[A]n employer ha[s] every right to restrict the use of company telephones to business-related conversations . . .*”), *enf'd*, 857 F.2d 1474 (6th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989); *Union Carbide Corporation-Nuclear Division*, 259 NLRB 974, 980 (1981); *enfd. in relevant part*, *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983) (*employer could bar personal use of telephones, but employer held to*

have discriminatorily applied rule on personal telephone usage); Heath Co., 196 NLRB 134 (1972) (employer did not engage in objectionable conduct by refusing to allow prounion employees to use public address system to respond to antiunion broadcasts).

So aside from the fact that the facsimile machines were never shutdown and that the union had multiple channels by which to convey its RFI's, the use of the Postal Service's fax machines for RFI use is a privilege granted to the union.

4. The Postal Service did not Violate the Act with regard to the various RFI's

a. 28-CA-244055

The testimony and exhibits show that the union had received the information on two separate occasions; on May 25 and again on June 27 the last of which was received just eight days before the information request dated July 5. Moreover, the union failed to use the DMO process that had been in place for two years. And union president Fajardo somehow couldn't find the time to follow up with management over this seemingly "important" information for 25 days. Because of the union's bad faith conduct, neither Plant Manager Jones nor DMO Christophersen was made aware of the referenced June 22, 2018, RFI until notification of the filing of the charge in this matter. "Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims." NLRB. v. Truitt Mfg. Co., 351 U.S. 149, 152, 76 S. Ct. 753, 755–56, 100 L. Ed. 1027 (1956). The Postal Service avers that the union's claims in this matter should not be countenanced.

b. 28-CA-229633

In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. “Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow.” *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the response, “the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information.” *Samaritan Medical Center*, 319 NLRB 392, 398 (1995). *See also United States Postal Service and Kilmer GMF Area Local No. 149*, 308 NLRB 547 (1992); *Seneca Electric Co.*, 265 NLRB 1531 (1982).

In this instance, the Postal Service did not fail or refuse to provide information to Steward Wood. Supervisor Mann responded to Steward Wood’s September 28, 2018 RFI on October 5, 2018 and his October 31, 2018 RFI on November 5, 2018—a time frame that is reasonable, lawful and within the parties’ agreed-to contractual deadlines. *See, e.g. United Engines, Inc.*, 222 NLRB 50, 56 (1976); *General Die Casters, Inc.*, 359 NLRB NO. 7, 61 (2012). Consequently, the Postal Service did not violate Sections 8(a)(1) and/or (5) of the Act.

c. 28-CA-229647

Manager Pantoja did not fail or refuse to provide the subject information to Steward Naranjo regarding all clerks FTR and PSE at the Five Points station. Manager Pantoja responded to all three RFIs at issue in this instant matter on October 4, 2018—

a time frame that is reasonable, lawful and within the parties' agreed-to contractual deadlines. After learning two clerks' clock rings were missing from the package provided to Steward Naranjo on October 4, 2018, Manager Pantoja clarified with Steward Naranjo upon his return to the office and provided the missing clock rings on October 30, 2018. Moreover, Manager Pantoja granted Steward Naranjo's request for extension to meet on the corresponding grievances, which was submitted on October 12, 2018. As such, any delay in forwarding the outstanding information was *de minimus* in nature, did not prejudice either party and did not violate the Act.

D. CONCLUSION

Based on the foregoing evidence and law, the Postal Service avers that the General Counsel has failed to prove any of these cases and therefore all the charges and the Consolidated Complaint should be dismissed.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dallas G. Kingsbury". The signature is fluid and cursive, with the first name "Dallas" being the most prominent.

Dallas G. Kingsbury, Attorney
Law Department – NLRB
United States Postal Service
1720 Market Street, Room 2400
St. Louis, MO 63155-9948
(702) 361-9349
(314) 345-5893 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of October, 2019, I served the foregoing
Post Hearing Brief, unless otherwise indicated, via regular first-class mail as follows:

DIVISION OF JUDGES

(VIA E-FILE)

Jeffrey Wedekind
Administrative Law Judge
National Labor Relations Board
901 Market Street
Suite 300
San Francisco, CA 94103-1779
jeffrey.wedekind@nrlrb.gov

cc: via email

Cornele Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 North Central Avenue
Suite 1400
Phoenix, AZ 85004-3099

cornele.overstreet@nrlrb.gov

Katherine E. Leung, Field Attorney
National Labor Relations Board
Region 28, Albuquerque Resident Office
421 Gold Ave. Ste. 310
Albuquerque, NM 87103

Katherine.Leung@nrlrb.gov

CHARGING PARTY

Daniel Diaz-Huerta
APWU, Local 380
P.O. Box 25163
Albuquerque, NM 87101-9950

/S/

Dallas G. Kingsbury